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# UNCONSTITUTIONAL HOSTING OF THE SUPER BOWL: ANTI-AMBUSH MARKETING CLEAN ZONES' VIOLATION OF THE FIRST AMENDMENT

To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such . . . is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.<sup>1</sup>

## I. INTRODUCTION

The National Football League (NFL) is the premier sports entity in the United States. Since the Super Bowl, the NFL's championship game, began in 1967,<sup>2</sup> the now international spectacle has grown to new heights. In 2011, Super Bowl XLV, between the Green Bay Packers and Pittsburgh Steelers, drew 111 million viewers nationwide, surpassing the 106.5 million viewers nationwide who tuned in to Super Bowl XLIV, which bested the previously most-watched program, the "M\*A\*S\*H" series finale.<sup>3</sup> Even more astounding is that the Super Bowl, as of 2009, is televised in 232 countries worldwide.<sup>4</sup>

However, success breeds tension. From 2005 through 2009, the top three

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1. *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring).

2. *Super Bowl History*, NFL.COM, <http://www.nfl.com/superbowl/history> (last visited Feb. 21, 2011).

3. Ben Klayman, *Super Bowl Packs in Record U.S. TV Viewer Total*, REUTERS.COM (Feb. 7, 2011), <http://www.reuters.com/article/2011/02/07/us-superbowl-ratings-idustre7163GS20110207>.

4. *Superbowl XLIII and Superbowl Fun Facts*, THENFLTHISWEEK (Feb. 1, 2009), <http://thenflthisweek.com/superbowl-xliii-and-superbowl-fun-facts/>.

Super Bowl advertising spenders were all competitors of official NFL sponsors.<sup>5</sup> The Super Bowl broadcasting rights-holder is permitted to sell the television commercial spaces to anyone willing to pay the enormous \$3 million rate for thirty seconds.<sup>6</sup> Nonofficial sponsors view the Super Bowl as an opportunity to spotlight highly creative commercials to more than 111 million people. If the NFL required the Super Bowl broadcasting rights-holder to sell advertising space only to official NFL sponsors, the broadcasting rights-holder would likely be paying millions less in rights fees because significantly fewer businesses would be permitted to buy advertising time; therefore, the supply would be greater, the demand lower, and advertising prices would drop proportionately from the approximately \$3 million for a thirty-second commercial currently costs.<sup>7</sup>

This Comment focuses mostly on the NFL's conduct in protecting the Super Bowl and its own official sponsors from ambush marketing tactics. Sports entities, like the NFL, may have a contractual obligation to official sponsors to reasonably protect against ambush marketing.<sup>8</sup> In fact, "[p]rudent sponsors negotiate contractual provisions that reduce the sponsorship fees payable in the event sponsorship rights are devalued. Contractual provisions are also important for providing sponsors with the first option to become sponsors of the broadcast coverage and on other media, such as the official website."<sup>9</sup> Some sports entities find it necessary to educate the public about ambush marketing and how such ambushers can break the law, as the Federation of International Football Association (FIFA) does for the World Cup.<sup>10</sup>

To curb nonsponsor activity on location at the Super Bowl, the NFL has seemingly decided to use a grassroots approach. In its bid package sent to

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5. *Most Super Bowl Viewers Tune in for the Commercials Nielsen Says*, NIELSEN (Jan. 20, 2010), [http://www.nielsen.com/us/en/insights/press-room/2010/most\\_super\\_bowl\\_viewers.html](http://www.nielsen.com/us/en/insights/press-room/2010/most_super_bowl_viewers.html) (the top three advertisers were Bud Light, Budweiser, and Coca-Cola; their NFL official-sponsor competitors were Coors Light and Pepsi).

6. *Marketers Look to Super Bowl Pregame With In-Game Inventory Sold*, SPORTS BUS. J. DAILY (Feb. 3, 2011), <http://www.sportsbusinessdaily.com/Daily/Issues/2011/02/3/Marketing-and-Sponsorship/SB-Ads.aspx>.

7. *See Id.*

8. *See* SIMON GARDINER ET AL., SPORTS LAW 469 (3d ed. 2006).

9. *Id.*; *see* Steve McKelvey & John Grady, *Ambush Marketing: The Legal Battleground for Sport Marketers*, 21 ENT. & SPORTS LAW. 8, 14 (2004).

10. *See* THE FIFA RIGHTS PROTECTION PROGRAMME AT THE 2010 FIFA WORLD CUP SOUTH AFRICA (2010). [http://es.fifa.com/mm/document/affederation/marketing/01/18/98/99/march2010/rightsprotection\\_a5\\_20100308.pdf](http://es.fifa.com/mm/document/affederation/marketing/01/18/98/99/march2010/rightsprotection_a5_20100308.pdf) (educated the public by posting an informational brochure about the event's rights and protection on the event website).

potential Super Bowl host cities, the NFL requires that the host city enact an ordinance prohibiting “temporary signs, inflatables and buildings wrapped with advertising banners” in an area covering a one mile radius around the stadium site during Super Bowl week.<sup>11</sup> The NFL likely makes this a necessity for hosting a Super Bowl to prevent ambush marketing and preserve the value of its official sponsorships, among other reasons. Furthermore, the NFL can legally make such a requirement without directly infringing on commercial speech freedoms by encouraging the host city to enact a temporary clean-zone ordinance prohibiting signage and advertising.<sup>12</sup> Although the NFL would likely argue that such clean-zone ordinances are for the purpose of furthering aesthetic and safety interests surrounding the Super Bowl,<sup>13</sup> based on North Texas’ Bid Summary, it could be speculated that the main purpose and interest for enacting the clean-zone ordinances is to protect the Super Bowl and the NFL official sponsors against ambush marketing.<sup>14</sup> Super Bowl XLV seemingly went by without any issues or challenges as it related to the clean-zone ordinances in Arlington and Fort Worth, Texas—except for some minor confusion as to how the ordinance would be enforced.<sup>15</sup> However, if a future Super Bowl host city enacts an ordinance that matches exactly what the NFL asks for in its bid package, as Fort Worth did, those cities should also be prepared for constitutional challenges to such clean-zone ordinances.

This Comment will begin by exploring the meaning of ambush marketing, its relation to consumer confusion pursuant to the Lanham Act,<sup>16</sup> and actual examples of its practice through case law. Part II will provide an analysis of how legislators have acted to control the ambush marketing practice; both domestic and foreign legislation will be discussed. Although the Lanham Act will likely not be a factor in determining the constitutionality of the clean-zone ordinances, the Act is necessary to understand how certain types of ambush marketing tactics are illegal in the United States. Part III will review

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11. *Arlington Addresses NFL’s Needs in 2011 Super Bowl Bid*, SPORTS BUS. J. DAILY (Apr. 13, 2007), <http://www.sportsbusinessdaily.com/article/111100> (citation omitted).

12. See ARLINGTON, TEX., ORDINANCE NO. 10-095 (2011) (repealed 2011); FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010 (2010) (repealed 2011).

13. Telephone Interview with Dave Weinberg, Legal Counsel, NFL (Nov. 11, 2010).

14. See *Super Bowl Bid Summary*, N. TEX. SUPER BOWL XLV HOST COMMITTEE 62–63 (2008), available at <http://www.star-telegram.com/Multimedia/News/Super%20Bowl%20bid2.pdf> [hereinafter *North Texas Bid Summary*].

15. Monika Diaz, *Businesses Confused by Super Bowl ‘Clean Zones’*, WFAA.COM, (Jan. 29, 2011), <http://www.wfaa.com/news/local/City-NFL-clean-zones-cause-confusion-for-business-owners-114845989.html>.

16. See generally Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1114, 1125 (2011).

municipal ordinances that have been upheld or struck down for violating the First Amendment's protection of commercial speech. Part IV will discuss the NFL's policy requiring Super Bowl host cities to enact an anti-ambush marketing clean-zone ordinance as well as Fort Worth, Texas' enacted (and now repealed) clean-zone ordinance. Lastly, Part V will present a case for whether Super Bowl host city clean-zone ordinances may or may not infringe upon commercial freedoms of speech.

## II. AMBUSH MARKETING AND CONSUMER CONFUSION

Imagine that a business paid millions of dollars to be associated with a major sports entity and gained the full benefits of association, such as use of the entity's name, likeness, and marks; signage rights and sampling opportunities at the entity's major events; and many more similar benefits. Now imagine if the business' major competitor put up signage and a tent outside the event's facility to market its own products to consumers as they entered or walked around the facility. This is just a minor example of how ambush marketing can take place in the sports industry.

Ambush marketing occurs at every level of sport. One of the earliest and most well-known ambush marketing tactics took place at the international level through the telecast of the Olympic Games. Visa was the official credit card of the 1992 Summer Olympic Games in Barcelona, Spain.<sup>17</sup> American Express, "to counter Visa's advertisement of its wide acceptance at the Olympics," bought a considerable amount of commercial space on major television networks leading up to and during the Olympics.<sup>18</sup> American Express did not use any symbol, logo, or word registered to the International Olympic Committee, but certainly suggested a competitive attitude against Visa—and an indirect association with the Olympic Games—by stating in its advertising, "In Spain, you won't need a Visa."<sup>19</sup>

There are numerous ways to define ambush marketing, and no one definition is all-inclusive. One way to explain the practice is when businesses advertise around a certain event, or organized professional or amateur sport or team, without paying rights fees to be an official sponsor and, therefore, be

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17. DOYCE J. COTTEN & JOHN T. WOLOHAN, *LAW FOR RECREATION AND SPORT MANAGERS* 626 (5th ed. 2010); *see also* Edward Vassallo, et al., *An International Look at Ambush Marketing*, 95 *TRADEMARK REP.* 1338, 1338 (2005) (explaining the same tactic used against Visa for the 1994 Winter Olympics in Norway).

18. Lori L. Bean, Note, *Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 *B.U. L. REV.* 1099, 1103 (1995).

19. *Id.* at 1104.

officially associated with the sports entity.<sup>20</sup> These businesses use ambush marketing tactics to unofficially associate themselves with the entity, potentially leading to a likelihood of consumer confusion and weakening of any official sponsorship's value.<sup>21</sup> Another definition is a company's intention to "capitalize on the goodwill, reputation and popularity of a particular sport or event by creating an association without the authorization or consent of the necessary parties" and not an intention to directly weaken a competitor's official sponsorship value.<sup>22</sup> No matter how one defines it, ambush marketing is a prevalent concern that many sports entities must deal with to protect not only their own trademarks and goodwill, but their official sponsorship values as well.

No matter how ambush marketing is defined, its practice has generally been upheld in courts, although there are exceptions.<sup>23</sup> The Lanham Act has been commonly applied to ambush marketing cases because the most logical argument about ambush marketing is that it creates a likelihood of consumer confusion as to who is actually associated with the sports entity.<sup>24</sup>

#### A. The Lanham Act

The Lanham Act provides sports entities with legal remedies from trademark infringement and misappropriation of goodwill.<sup>25</sup> For example, the NFL might bring a claim under the Lanham Act if a nonofficial sponsor's conduct creates a mistaken belief in consumers' minds that the company is associated or endorsed by the NFL. The Lanham Act's primary purpose in regulating trademark law is to limit consumer confusion in the marketplace by punishing unfair competition and false advertising through unauthorized use of another's marks.<sup>26</sup> To be deemed liable under the Lanham Act, the claim's

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20. See McKelvey & Grady, *supra* note 9, at 8–9.

21. See *id.*; Anita M. Moorman & T. Christopher Greenwell, *Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices*, 15 J. LEGAL ASPECTS SPORT 183, 184 (2005) (citations omitted); Bean, *supra* note 18, at 1100.

22. McKelvey & Grady, *supra* note 9, at 9.

23. See, e.g., *NFL v. Gov. of Del.*, 435 F. Supp. 1372 (D. Del. 1977).

24. See, e.g., *id.*; see also *NHL v. Pepsi-Cola Can., Ltd.* (1992) 70 B.C.L.R. 2d 27 (Can. B.C. Sup. Ct.).

25. Moorman & Greenwell, *supra* note 21, at 185.

26. *Id.*; see generally 15 U.S.C. §§ 1114, 1125 (2011); Bean, *supra* note 18, at 1110 (stating that

The primary purposes of trademark law are to: (1) 'identify one seller's goods and distinguish them from goods sold by others[;]' (2) signify that all goods bearing the trademark come from a single source and are of an equal level of quality; and (3) act as an instrument in the advertising and selling of goods. Trademark law also protects the mark

proponent—likely a sports entity in sports-related ambush marketing cases—must show that the defendant-ambusher was not authorized to use the proponent's registered mark(s),<sup>27</sup> and that the unauthorized use created a likelihood of consumer confusion.<sup>28</sup> If there is no agreement between the parties allowing the defendant ambusher to use the plaintiff entity's trademarks (e.g. logos, name), then it is likely that the defendant ambusher was not authorized to use the plaintiff entity's marks. Likelihood of confusion is shown by a possibility of a public misconception that the mark's owner approved the ambusher's use of the entity's trademark; however, no actual confusion is required to find the defendant ambusher liable under the Act.<sup>29</sup>

A sports entity, like the NFL, which believes its sponsorship rights have been exploited by ambush marketing tactics may look to the Lanham Act when seeking remedies.<sup>30</sup> The issue with applying the Lanham Act to ambush marketers is that smart and successful ambushers will likely not use the entity's exact logo or other registered mark.<sup>31</sup> The Lanham Act is not likely to protect a business entity mark when ambushers either do not use the mark or merely use a comparable mark or reference in their advertising.<sup>32</sup> For example, when a nonofficial sponsor creates a sweepstakes in December and January for consumers to win tickets to "the Big Game," consumers know it is referring to the Super Bowl without the nonofficial sponsor actually using a NFL mark.

For example, in 1976, the State of Delaware began a lottery program where lottery purchasers could bet each week on NFL games.<sup>33</sup> There were three different lottery games available throughout the season, and their basic purpose was for lottery players to pick at least three teams to win each week; the participant would win if he picked all the correct winners.<sup>34</sup> In addition to

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as an objective symbol of a business' good will.);

Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 16–17 (1992) (stating that the Lanham Act's purpose is to prevent competitors from deceiving consumers who act on the false advertising) (citations omitted).

27. 15 U.S.C. § 1114(1).

28. 15 U.S.C. § 1125(a)(1).

29. *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204–05 (2d Cir. 1979).

30. *Moorman & Greenwell, supra* note 21, at 185.

31. *See id.* at 186.

32. *Id.*

33. *NFL*, 435 F. Supp. at 1375–76.

34. *Id.* at 1376.

other claims, the NFL argued that Delaware violated the Lanham Act by using the NFL schedule to create a lottery game, and benefited from such conduct while infringing on the NFL's trademark rights.<sup>35</sup> The court held that because the lottery tickets did not use any NFL team nickname or any other NFL registered mark, the fact that the lottery used only the team's city name did not "constitute infringement of [the NFL's] registered marks or unfair competition."<sup>36</sup>

Alternatively, the court held that a business may not advertise its products in such a manner that would create confusion in the consumer's mind that the product is somehow associated with, or endorsed by, the registered markholder when no association or endorsement actually exists.<sup>37</sup> The court held that the Delaware Lottery violated the Lanham Act due to a showing by the NFL that a substantial percentage of the NFL audience in Delaware was actually, or was likely to be, confused about whether the Delaware Lottery was officially associated with or endorsed by the NFL.<sup>38</sup> The court ruled that one-fifth of the survey participants constituted substantial confusion because 21% of NFL fans "either said that, as far as they knew, the legalized betting on professional football was arranged by the State with the authorization of the teams or said that it was conducted by the teams alone."<sup>39</sup> After finding substantial confusion amongst consumers, the court required the Delaware Lottery to put a prominent and clear disclaimer on every lottery ticket, and in all advertising, that the lottery program was in no way associated with or authorized by the NFL.<sup>40</sup> Unfortunately for the NFL, this remedy was not as severe as it argued for; the NFL wanted the court to grant a full injunction on the entire lottery program as it related to the NFL games.<sup>41</sup>

National Football League v. Governor of the State of Delaware illustrates that businesses may benefit and profit from the NFL's popularity without, at least in this case, arising to misappropriation.<sup>42</sup> The business must merely provide a clear and prominent disclaimer that states the business and product are not affiliated with or sponsored by the NFL, as other courts have ruled.<sup>43</sup>

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35. *Id.* at 1380.

36. *Id.*

37. *Id.*; *see also* 15 U.S.C. § 1125(a) (2011).

38. *NFL*, 435 F. Supp. at 1380–81.

39. *Id.* at 1381.

40. *Id.*

41. *Id.* at 1376–77.

42. *Id.* at 1378.

43. *Id.* at 1381; *see McKelvey & Grady, supra* note 9, at 11–13; *see generally* *NHL v. Pepsi-Cola Can., Ltd.* (1992) 70 B.C.L.R. 2d 27 (Can. B.C. Sup. Ct.).



Based on this holding, it could be inferred that a business may use ambush marketing tactics in any way or manner it wishes so long as it does not use the entity's registered marks and does use a disclaimer stating it is not endorsed or connected to the entity in any way.

### *B. Event-Specific Legislation*

A common trend in sports today is for sport entities to place a requirement on the local governments hosting the event to enact legislation to protect the entity's marks and the value of its official sponsorships, causing the suppression of commercial speech.<sup>44</sup> It has been argued that even though such requirements impede on what is supposed to be free commercial speech—at least in the United States—politicians have never actually put up a fight against sports entities in enacting the requirements.<sup>45</sup> While this Comment is focused on the NFL's clean-zone requirement, it is necessary to discuss the oldest surviving international sporting event first.

More than any other sporting event, the Olympic Games (Games) are supposed to be the most pure. There are no sponsor logos or signage inside event facilities; the only corporate marks seen on the athletes while competing are the actual apparel companies' logo, but even the logo's size is limited.<sup>46</sup> Even more cherished than the "purity" and aesthetics of the Games are the Olympic marks. More than any other entity, courts throughout the world have ruled against ambush marketers in false advertising and consumer confusion cases when Olympic marks are involved.<sup>47</sup> This is because national legislatures have enacted laws strictly protecting the use of Olympic marks and advertising that purport to imply an association or connection to the Games.<sup>48</sup>

#### 1. United States: Ted Stevens Amateur Sports Act<sup>49</sup>

The Ted Stevens Amateur Sports Act (ASA) "grants the United States Olympic Committee (USOC) an almost absolute right to control the use of any

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44. John Grady et al., *From Beijing 2008 to London 2012: Examining Event-Specific Olympic Legislation Vis à Vis the Rights and Interests of Stakeholders*, 3 J. SPONSORSHIP 1, 1 (2010).

45. *Id.* at 6–7.

46. Chris Isidore, *Olympics' No-Name Sponsors*, CNNMONEY (Feb. 15, 2002), [http://money.cnn.com/2002/02/15/olympics/olympics\\_sponsors/](http://money.cnn.com/2002/02/15/olympics/olympics_sponsors/).

47. See *infra*, the discussion of domestic and foreign legislation and application.

48. See *infra*, the discussion of domestic and foreign legislation.

49. See generally Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2011).

Olympic-related words, marks, mottos or insignia by others.”<sup>50</sup> The ASA does not require the USOC to show any likelihood of confusion—as required by the Lanham Act—to make a successful infringement case as to the Olympic symbols.<sup>51</sup> The ASA grants exclusive right to the USOC to the five interlocking rings symbol and the word “Olympic” itself.<sup>52</sup> Furthermore, the ASA permits the USOC to authorize sponsors and other such contributors of goods and services to use the protected marks in its advertising to illustrate that it is a sponsor or contributor to the USOC.<sup>53</sup> Although the act does not explicitly reference ambush marketing as a purpose of what it intends to prohibit, it can certainly be implied.<sup>54</sup>

The USOC may bring a civil action against an alleged violator of the ASA “if the person, without the consent of the [USOC], uses [the Olympic marks or words] for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition.”<sup>55</sup> The subsection also provides the same remedy for any advertising by a business that gives a false representation of association with or endorsement of the Games themselves,<sup>56</sup> which seemingly protects the USOC and its sponsors from the most obvious ambush marketing tactics.

However, one caveat to the ASA is the marks’ use must be for commercial purposes or to promote athletic competition.<sup>57</sup> When deciding whether speech is commercial, a court will discuss three factors in making its determination: (1) whether the speech is an advertisement; (2) whether the speech references a specific product; and (3) whether the speech is motivated by an economic interest.<sup>58</sup> In short, the main question is whether the speech suggests a commercial transaction.<sup>59</sup> In *United States Olympic Committee v. American Media, Inc.*, the United States District Court of Colorado ruled that, although

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50. Vassallo et al., *supra* note 17, at 1350; *see, e.g.*, *U.S. Olympic Comm. v. Intelicense Corp.*, 737 F.2d 263, 266 (2d Cir. 1984) (stating that the ASA’s legislative intent is “to promote the United States Olympic effort by entrusting the USOC with unfettered control over the commercial use of Olympic-related designations.”).

51. 36 U.S.C. § 220506(c) (2011); *see also* Vassallo et al., *supra* note 17, at 1350.

52. § 220506(a)(2), (4).

53. § 220506(b).

54. Vassallo, et al., *supra* note 17, at 1350.

55. § 220506(c).

56. § 220506(c)(4).

57. *See generally* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200 (D. Colo. 2001).

58. *Am. Media*, 156 F. Supp. 2d at 1207 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)).

59. *Id.*

the defendant used the word “Olympic” in its magazine titled Olympics USA, the USOC failed to state a claim under the ASA upon which relief could be granted because the court found that American Media (AMI) was not using the word “Olympics” for a commercial purpose.<sup>60</sup> The USOC argued that AMI allegedly used Olympic marks and words covered under the ASA “‘for the purpose of trade and to induce the sale of [its magazine],’ and to ‘pass off OLYMPICS USA as if it were authorized by the USOC’” in a way intended to confuse Olympic consumers.<sup>61</sup> More specifically, the USOC alleged that AMI, without permission, used illustrations of Olympic medals, the Olympic torch, and other such Olympic-related symbols for the purpose of selling its magazine.<sup>62</sup> Furthermore—and more related to ambush marketing—the USOC asserted “that AMI’s unauthorized use of its marks will encourage ‘other companies that are not Olympic sponsors/suppliers/licensees . . . to use . . . [Olympic] marks and terminology without entering into a sponsorship, suppliership, or other licensing agreement[s]’” and “will ‘likely impair the USOC’s relationships with its existing and prospective sponsors, suppliers, and other licensees.’”<sup>63</sup>

The court, however, agreed with AMI that it did not violate the ASA by publishing Olympic-related content in its magazine<sup>64</sup> because the title itself was not commercial speech.<sup>65</sup> The court also relied on AMI’s disclaimer—as the court in Delaware required on the state’s lottery tickets—because it stated the magazine was not affiliated or licensed by the USOC or the Olympic Games.<sup>66</sup> However, it could be argued that the title was commercial speech because the title of a magazine or book certainly has an effect on whether one buys the magazine, especially when the magazine is so closely related to an event such as the Olympics. The ASA is one example of how the United States protects the Olympic properties from ambush marketing tactics to protect the branding and marks of the USOC and the Games; other countries

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60. *Id.* at 1202.

61. *Id.* at 1203 (citation omitted).

62. *Id.*

63. *Id.* at 1203–04.

64. *Id.* at 1210.

65. *Id.* at 1209.

66. *Id.* at 1203 n.3; *but see, e.g., S.F. Arts & Athletics, Inc.*, 483 U.S. at 522 (holding that a non-profit organization could not use the word “Olympic” in its event called the “Gay Olympic Games” because the use of the phrase “Olympic Games” related to athletic participation). For further insight on use of trademarks subject to the ASA, see Erinn M. Batcha, Comment, *Who Are the Real Competitors in the Olympic Games? Dual Olympic Battles: Trademark Infringement and Ambush Marketing Harm Corporate Sponsors – Violations Against the USOC and its Corporate Sponsors*, 8 SETON HALL J. SPORTS L. 229, 231 (1998).

around the world have also enacted similar—and more stringent—statutes to not only protect the Olympic marks, but other major international events as well.

## 2. Foreign Legislation Protecting Against Ambush Marketing

Three years prior to the 2010 Winter Olympic Games in Vancouver, the Canadian Senate enacted the Olympic and Paralympic Marks Act (Bill C-47).<sup>67</sup> The Act's purpose, similar to the Lanham Act and the ASA, was to prohibit companies from using "an Olympic or Paralympic mark or a mark that so nearly resembles an Olympic or Paralympic mark" where it is likely to cause confusion.<sup>68</sup> Furthermore, Bill C-47 also implied that no company shall mislead and confuse the public into believing that the company was approved and authorized by any organizing committee, including Canada's, to use the mark or in some way be officially associated with a specific organizing committee or the Games itself.<sup>69</sup>

Other countries have enacted similar legislation for the Olympic Games as well: China (Regulations on the Protection of Olympic Symbols),<sup>70</sup> Greece (Protection of the Olympic Symbol),<sup>71</sup> Italy (Turin Olympics Act),<sup>72</sup> and Australia (Sydney 2000 Games Protection Act 1996).<sup>73</sup>

However, the Olympic Games are not the only international spectacle "ripe" for ambush marketers to profit off the event's goodwill. One could argue that the FIFA World Cup is certainly equal to, if not more popular than, the Olympics. Easily the strictest laws of all, South Africa originally used the Trade Practices Act<sup>74</sup> (TPA) and Merchandise Marks Act<sup>75</sup> (MMA) in

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67. Olympic and Paralympic Marks Act, S.C. 2007, c. 25, § 3 (Can.); Nancy A. Miller, *Ambush Marketing and the 2010 Vancouver-Whistler Olympic Games: A Prospective View*, 22 INTELL. PROP. J. 75, 82 (2009).

68. Miller, *supra* note 67, at 87.

69. See S.C. 2007, c. 25, § 4(1).

70. See Anne M. Wall, *Intellectual Property Protection in China: Enforcing Trademark Rights*, 17 MARQ. SPORTS L. REV. 341, 367–68 (2006); see also Grady et al., *supra* note 44, at 4.

71. See PHILLIP JOHNSON, *AMBUSH MARKETING: A PRACTICAL GUIDE TO PROTECTING THE BRAND OF A SPORTING EVENT* 122 (2008) (citing Law 2598/1998 Organisation of the Olympic Games–Athens 2004, Art. 3).

72. *Id.* (citing Law of August 17, 2005 No.167, Art. 1(2) (measures for the protection of the Olympic symbol in relation to the Turin 2006 Olympics)).

73. *Id.* at 122–23; see also Vassallo, et al., *supra* note 17, at 1350–51 (distinguishing the Sydney Games Act from the ASA—in addition to the Olympics' mottos and trademarks, it included vague use such as "Sydney 2000" and "Summer Games" as well as "any visual or aural representations that, to a reasonable person, . . . would suggest a connection" with the Sydney 2000 Games.)).

74. Vassallo, et al., *supra* note 17, at 1349 (citing Trade Practices Act 76 of 1976, s. 52–53).

association with the 2003 Cricket World Cup, but the 2010 FIFA World Cup and its official sponsors were its most recent beneficiaries.<sup>76</sup> The laws make ambush marketing a criminal offense, resulting in large fines and lengthy jail time for violators during protected events such as the FIFA World Cup.<sup>77</sup> The TPA, like the Lanham Act, prohibits “publication or display of false or misleading statements or ads implying a contractual or other connection with a sponsored event . . . .”<sup>78</sup> The MMA prohibits intentional use of a trademark in association with an event when the perpetrator has not received consent from the event organizer.<sup>79</sup> Furthermore, the mark must be used in a way where the perpetrator received a free unofficial association with the event.<sup>80</sup>

The TPA was first applied to “ambushers” of the 2003 Cricket World Cup.<sup>81</sup> Two teachers took students, who had Coca-Cola in their lunches, to a cricket match—Pepsi was the event’s official sponsor.<sup>82</sup> Event officials would not permit the students’ “entry until they peeled off the Coca-Cola labels and scraped off the logos from all the bottle tops and lids.”<sup>83</sup> Security’s conduct makes one wonder what the event officials’ goals were in this situation because it would have made more sense to have the students merely throw out the Coca-Colas, similar to many other sport facilities and events that prohibit attendees from bringing in soda.

Ambush marketing is a constant threat to the protection of sports entities’ marks and brands, as well as the value of its official sponsorships. The NFL, by recommending that Super Bowl host cities enact clean-zone ordinances, has devised its own way to protect the aesthetic feel and branding of the Super Bowl in addition to protecting its official sponsorship values; however, commercial speech protection under the First Amendment must be discussed to determine whether the NFL’s recommendation is actually constitutional.

### III. CONSTITUTIONALITY OF MUNICIPAL ORDINANCES AND THEIR AFFECT ON BUSINESS BRANDING AND COMMERCIAL SPEECH

Successful branding is one of the most vital business practices a

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75. Merchandise Marks Act 17 of 1941, § 15A (S. Afr.).

76. Vassallo, et al., *supra* note 17, at 1348–50.

77. *Id.*

78. *Id.* at 1349.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* (citation omitted).

83. *Id.*

company—or even an individual—can use to create a flourishing business or career. Everyone is a brand, individuals and businesses alike, constantly branding himself in perpetuity. Successful branding is not merely saying the right words at the right time and place, it is also advertising to the best consumer market to buy what one sells, not misleading consumers, creating a strong consumer base that has knowledge that one's product exists, building a reputation for quality, having others stand behind and advocate for one's product, and, most importantly, not having others demean the brand unlawfully through false association or otherwise. The most popular way to brand a business is through advertising, which is the act of promoting a product, service, or event by giving notice of it to a public medium.<sup>84</sup> Many businesses advertise in newspapers, on television and radio, but also—and more relevant here—through signage and vending in public space. Through commercial free speech, businesses advocate for themselves, advertising their brand to others. However, such commercial speech is not always permitted by law or protected by the First Amendment.

#### A. Constitutional Regulation of Branding: Commercial Speech

Courts have historically treated commercial speech restrictions much differently than restrictions on noncommercial speech.<sup>85</sup> However, commercially communicative activity, such as advertising, is protected by the First Amendment in most circumstances.<sup>86</sup> There has generally been a disagreement among the courts about what commercial speech is. The Supreme Court has suggested that commercial speech is not easily definable but still described it as any communication that tends to propose a commercial transaction or, similarly, “expression related solely to the economic interests of the speaker and its audience.”<sup>87</sup> Protection of commercial speech is based on the First Amendment's protection of the right to disseminate information.<sup>88</sup>

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84. Definition of Advertisement, OXFORD DICTIONARY, available at [http://oxforddictionaries.com/view/entry/m\\_en\\_us1220116](http://oxforddictionaries.com/view/entry/m_en_us1220116) (last visited Feb. 22, 2011).

85. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980).

86. See U.S. CONST. amend. I; see also Darrel C. Menche, *Reconciling Speech and Structural Elements in Sign Regulation*, 44 GONZ. L. REV. 283, 287 (2009).

87. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

88. Kerri L. Keller, Note, *Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends First Amendment Guarantees Up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133, 142 (2002); see *Va. State Bd. of Pharmacy*, 425 U.S. at 765 (describing advertising as the “dissemination of information as to who is producing and selling what

However, to have protection under the First Amendment, advertising is strictly limited to truthful, nonmisleading communication.<sup>89</sup> Furthermore, the fact that commercial speech is protected by the First Amendment only if it is both truthful and nonmisleading fits squarely within the Lanham Act, which prohibits a business from misleading or misrepresenting its products to consumers and creating a likelihood of confusion that may result in false advertisement.<sup>90</sup> Additionally, when state law is at issue, the First Amendment is applied to the states through the Fourteenth Amendment and, therefore, protects commercial speech from unconstitutional governmental restrictions.<sup>91</sup>

When an ordinance's purpose is to restrict commercial speech, courts have generally favored the government's exercise of its police power, which strengthens the legality of subjecting signage or vending in the public medium to municipal regulations and weakens commercial speech's protection by the First Amendment.<sup>92</sup> Nevertheless, there are occasions when an ordinance will not be favored, generally due to a lack of legitimate governmental interests that are directly furthered by suppressing such commercial speech.

### 1. The Commercial Speech Doctrine

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the state government enacted an ordinance prohibiting all advertising promoting the use of electricity in New York State.<sup>93</sup> The Supreme Court held that, although the Constitution does not protect commercial speech to the extent of other forms of expression, the protection available for commercial speech depends on whether the speech itself is legal, as well as the governmental interests furthered by the regulation.<sup>94</sup> To determine whether the regulation unconstitutionally infringed upon the plaintiff's commercial speech rights as protected by the First Amendment, the Court created what is now known as the Commercial Speech Doctrine, or the *Central Hudson* test.<sup>95</sup>

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product, for what reason, and at what price . . . [and to] this end, the free flow of commercial information is indispensable.”).

89. Keller, *supra* note 88, at 142; *see Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

90. 15 U.S.C. § 1125 (2011).

91. *See* U.S. CONST. amend. XIV, § 1; *see also Va. State Bd. of Pharmacy*, 425 U.S. at 761–62.

92. Menthe, *supra* note 86, at 283.

93. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 558.

94. *Id.* at 562–63.

95. *Id.*

Under the test, the commercial speech must neither mislead the public nor be related to an illegal activity.<sup>96</sup> The Court's intent was to permit government prohibition of communication that was "more likely to deceive the public than to inform it,"<sup>97</sup> which is a similar purpose—as related to ambush marketing—for the Lanham Act. If the commercial speech at issue meets the nonmisleading and legal activity standard, it may be subject to First Amendment protection.<sup>98</sup> The next determination is whether the government asserts a legitimate interest for suppressing commercial speech.<sup>99</sup> Lastly, as the First Amendment demands, any restriction on speech must directly advance the asserted legitimate governmental interest and be narrowly tailored to achieve the asserted interests.<sup>100</sup> Otherwise, the excessive restriction cannot survive.<sup>101</sup>

## 2. Legitimate Governmental Interests for Clean-Zone Ordinances

The most common legitimate interests likely to be applied to a Super Bowl host city's clean-zone ordinance are community aesthetics and safety.<sup>102</sup> Aesthetics lend to the quality of the city's appearance due to the absence of clutter or excessive off-site commercial signage, which has consistently been found a legitimate governmental interest. A municipality's desire to have a clean-looking presence is within its police power, so long as such restriction does not have an ulterior motive in restricting commercial speech.<sup>103</sup> Community safety, whether related to traffic or otherwise, is a common sense legitimate governmental interest. The Supreme Court held that billboards and signs are intended and designed to avert a person's concentration, regardless of whether he is driving, walking, or biking, and therefore, considering

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96. *Id.* at 563–64, 566.

97. *Id.* at 563 (citation omitted).

98. *Id.* at 566.

99. *Id.* at 564, 566.

100. *Id.* at 565.

101. *Id.* at 564.

102. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 493 (1981) (stating that the government's legitimate interests in its ordinance prohibiting all off-site outdoor advertising signs were health and safety as well as aesthetics); *San Francisco v. Eller Outdoor Adver.*, 237 Cal. Rptr. 815, 817 (Ct. App. 1987) (stating that, in banning all off-site commercial advertising, regardless of content, the city's legitimate interests were safety and aesthetics).

103. *Metromedia*, 453 U.S. at 510 (claiming that because "[a]esthetic judgments are necessarily subjective, defying objective evaluation, [such restrictions] must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.").



billboards as safety hazards is reasonable.<sup>104</sup> Furthermore, courts have ruled that aesthetics, as well as traffic safety, are legitimate governmental interests after Congress passed the Federal Highway Beautification Act of 1965,<sup>105</sup> which prohibits states from having billboards viewable from certain federally-funded highways.<sup>106</sup> Although such legitimate governmental interests facially pass the third element of the Central Hudson test, the regulations must be uniformly applied. However, courts have permitted a difference in treatment under First Amendment protections based on the distinction between on-site and off-site commercial speech.

### 3. On-Site vs. Off-Site Commercial Branding

Many courts, including the Supreme Court, have ruled that there is a legal distinction between on-site and off-site commercial advertising, even though both may be equally hazardous to safety and equally unappealing to the eye.<sup>107</sup> On-site signage includes advertising the business conducted, or the services or products sold, on the premises.<sup>108</sup> Conversely, off-site signs are those that are not located on the premises for which the sign advertises.<sup>109</sup>

In *Metromedia Inc. v. City of San Diego*, San Diego enacted an ordinance that prohibited all off-site outdoor advertising signs.<sup>110</sup> The plaintiff brought suit to challenge the constitutionality of the ordinance pursuant to the First and

104. *Id.* at 508–09.

105. 23 U.S.C. § 131 (2011).

106. § 131(a) (stating that the purpose for such legislation is “to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.”); *see Metromedia*, 453 U.S. at 510, n.16.

107. *Id.* at 511 (citing *Suffolk Outdoor Adver. Co. v. Hulse*, 439 U.S. 808 (1978); *Markham Adver. Co. v. Washington*, 393 U.S. 316 (1969); and *Newman Signs, Inc. v. Hjelle*, 440 U.S. 901 (1979)).

108. *Id.* at 493–94; *Eller Outdoor Adver.*, 237 Cal. Rptr. at 819 n.5; *see also Menthe*, *supra* note 86, at 312.

109. *Metromedia*, 453 U.S. at 493–94.

110. *Id.* at 494–95 (stating that although the ordinance prohibited off-site signage, it did provide exemptions for most non-commercial signage, including

government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; . . . for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; . . . and ‘temporary political campaign signs.’

Fort Worth, Texas also has a similar prohibition on off-site signage. *See FORT WORTH, TEX., ORDINANCE NO. 17872-11-2007, § 1, Art. 4(6.405(1))* (2007)).

Fourteenth Amendments.<sup>111</sup> Applying the Central Hudson test, the Court found (1) the commercial advertising at issue did not involve illegal activity or mislead its audience—plaintiff sold outdoor advertising<sup>112</sup>—and (2) the city’s interests in traffic safety and aesthetics were legitimate governmental interests.<sup>113</sup> Next, the Court held (3) there was a direct correlation between traffic safety and billboards,<sup>114</sup> and that there was also a direct correlation between advancing the city’s aesthetic interests and regulating signage.<sup>115</sup> Lastly, the Court held (4) the ordinance was not broader than necessary because billboards can create traffic hazards and unsightliness.<sup>116</sup> Therefore, the most direct and effective way to resolve such issues was to completely ban them.<sup>117</sup>

An important distinction is made in *Metromedia* between on-site and off-site commercial advertising—although both are similarly disruptive to safety and aesthetics. The Court upheld the City’s interest in protecting on-site commercial advertising over off-site commercial advertising because businesses, as well as the interested public, have stronger interests in identifying places “of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial [businesses] located elsewhere.”<sup>118</sup> In conclusion, the Court found off-site commercial advertising may be prohibited although on-site commercial advertising is permitted.<sup>119</sup>

#### 4. Permits and Licensing

This final subsection dealing with commercial branding relates to the requirement of permits or licenses to allow commercial speech in regulated areas. Although the NFL’s bid package does not, on its face, recommend the

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111. *Metromedia*, 453 U.S. at 498.

112. *Id.* at 507.

113. *Id.* at 507–08.

114. *Id.* at 509.

115. *Id.* at 510.

116. *Id.* at 508.

117. *Id.*

118. *Id.* at 512.

119. Although the court found nothing constitutionally invalid with the ordinance as it related to commercial speech, it did rule the ordinance unconstitutional because it impermissibly afforded commercial speech more protection than non-commercial speech, which has been held to violate constitutional law. *Id.* at 512–14. This may become a factor in deciding whether the NFL-related clean-zone ordinances are constitutional as applied to non-commercial law, but this Comment is more concerned with commercial advertising by nonofficial sponsors.

city to require permits for temporary signage, subject to approval, the bid package does recommend that the ordinance give the NFL the unbridled discretion to approve or deny requests for such temporary signage otherwise prohibited under the clean-zone ordinance.<sup>120</sup> Such a provision providing unbridled discretion to a private-sector company in the public forum will and should be found unconstitutional.

In *Atlanta Journal & Constitution v. City of Atlanta Department of Aviation*,<sup>121</sup> the Eleventh Circuit struck down an ordinance because a “grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional.”<sup>122</sup> In preparation for hosting the 1996 Olympic Games, Atlanta’s Department of Aviation (Department) required all vendors to obtain a permit and pay a permit fee in association with selling their products.<sup>123</sup> The ordinance prohibited newspaper companies from using their own newsracks, requiring the companies to use the city’s newsracks instead. The ordinance was not a regulation of commercial speech—as most ordinances discussed in this Comment are—but a discriminatory regulation of speech based upon its content. The Department had an agreement for an advertising deal with Coca-Cola to have its logos and advertising on the newsracks inside the airport.<sup>124</sup> Virtually any other advertising on such newsracks was prohibited.<sup>125</sup> However, the constitutional question was whether a Department official may be granted full and unbridled discretion to determine whether to grant approval for a permit.<sup>126</sup> The court held that the person charged with approving requests for permits must have clear and objective standards in determining such a request.<sup>127</sup> Absent those standards, the official’s use of unbridled discretion would violate First Amendment protections.<sup>128</sup>

The Ninth Circuit, in *Desert Outdoor Advertising, Inc. v. City of Moreno*

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120. *North Texas Bid Summary*, *supra* note 14, at 63.

121. *See generally* 322 F.3d 1298 (11th Cir. 2003).

122. *Id.* at 1310 (emphasis omitted); *see also* *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755, 764 (1988); *Desert Outdoor Adver., Inc. v. Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996). For a more general discussion on the unbridled discretion of permit requirements, *see* Menthe, *supra* note 86, at 314–18.

123. *Atlanta Journal & Constitution*, 322 F.3d at 1304.

124. *Id.*

125. *Id.*

126. *Id.* at 1310–11.

127. *Id.* at 1311.

128. *Id.*

Valley,<sup>129</sup> took the “unbridled discretion” rule one step further. It ruled that, although there were some standards for issuing a permit—“whether a particular . . . sign will be harmful to the community’s health, welfare, or ‘aesthetic quality’”—city officials may not have the discretion to deny a permit for ambiguous and subjective reasons.<sup>130</sup> Therefore, an ordinance must have specific and unambiguous criteria for determining whether a permit request shall be approved or denied.

Furthermore, Desert Outdoor also provided a standing requirement for bringing a claim against an allegedly unconstitutional permit ordinance for posting signage. There must be (1) an injury-in-fact, where the claimant has an actual and well-evidenced showing that the ordinance will be enforced against him, (2) the injury must be caused by the ordinance’s enactment, and (3) the injury can be remedied by a favorable decision.<sup>131</sup> Furthermore, a claimant may still have standing even if that party failed to apply for a permit when applying for such a permit would have been useless.<sup>132</sup> The Ninth Circuit ruled that the claimant’s application for a permit would have been useless because “the ordinance flatly prohibited [the] appellants’ off-site signs” located inside the regulated zones.<sup>133</sup>

Thus, if the Super Bowl host cities enact exactly what the NFL recommends—that all off-site commercial-speech-related activity within the clean zones is subject to NFL approval—those clean-zone ordinances should be found unconstitutional under the First Amendment because the ordinance would grant the NFL, a private entity, unbridled discretion to approve what businesses may speak through advertising.

#### IV. CLEAN-ZONE REGULATIONS

As discussed in Part II, ambush marketing has different meanings to different individuals. An event organizer might believe that ambush marketing is morally incorrect and should be an unfair business practice. However, one successful ambush marketer believes that ambush marketing is “ethically and legally correct since official sponsors only buy the official association with a particular event such as the Olympics or World Cup rather than the entire thematic space surrounding the event.”<sup>134</sup> One legal academic

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129. *See generally* 103 F.3d 814 (9th Cir. 1996).

130. *Id.* at 818–19.

131. *Id.* at 818.

132. *Id.* (citation omitted).

133. *Id.*

134. Moorman & Greenwell, *supra* note 21, at 184 (emphasis added). Jerry Welsh, the ambush

simplifies this by stating that “one cannot sell what one does not own, and no sport organization owns the entire concept of or aura surrounding a sport such as . . . football . . . .”<sup>135</sup> However, the NFL—the most popular United States sports league<sup>136</sup>—has been given such power to control who can advertise in and around the city during Super Bowl Week and, therefore, does own the local concept and aura that surrounds football’s championship game.

To prevent ambush marketing, sports leagues in the United States are extremely protective of the value of their official sponsorships. For example, the National Basketball Association (NBA) requires its All-Star Game host cities to enact a temporary ordinance during NBA All-Star Week to prevent ambush marketing.<sup>137</sup> In 2009, Arlington, Texas temporarily amended its already existing legislation to accommodate the NBA’s requirement for an anti-ambush marketing ordinance during the NBA All-Star Week.<sup>138</sup> The ordinance was enforced for eleven days, banning “temporary signs, tent sales, projected image signs, inflatables and other marketing activities in an area around the stadium if [the company has] no official ties to the All-Star Game.”<sup>139</sup> The NFL quickly followed suit at the same venue, requiring Arlington, as well as Fort Worth, to enact a similar anti-ambush marketing clean-zone ordinance for Super Bowl XLV at Cowboys Stadium in February 2011.<sup>140</sup>

#### *A. NFL Super Bowl Bid Package*

The bid request package sent to all cities interested in hosting the Super Bowl requires the host committee to work together with the local government to create anti-ambush marketing “clean zones.”<sup>141</sup> These clean zones encompass a one-mile radius around the event’s facility as well as “on the property of area airports, within a 6-block radiu[s] of the NFL Headquarters

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marketer referenced in the text, created American Express’ advertising campaign that ambushed the Olympics by implying an association with the Games in the 1990s. *Id.*

135. *Id.* (emphasis added).

136. See generally *MLS Sees 12-Month High in Popularity Among Avid Sports Fans*, SPORTS BUS. J. DAILY (Sept. 29, 2010), <http://www.sportsbusinessdaily.com/article/142491>.

137. Susan Schrock, *Arlington to Consider Advertising Rules to Protect NBA All-Star Game Sponsors from Rivals*, STAR-TELEGRAM.COM (Fort Worth, Tex.) (Nov. 29, 2009), <http://www.star-telegram.com/2009/11/29/1798287/arlington-to-consider-advertising.html>.

138. *Id.*

139. *Id.*

140. *Arlington Addresses NFL’s Needs in 2011 Super Bowl Bid*, *supra* note 11.

141. See *North Texas Bid Summary*, *supra* note 14, at 62–63.

Hotel and around the location of NFL Experience.”<sup>142</sup>

More specifically, the clean zones must include the following:

1. Temporary Structures – A prohibition against temporary structures, including but not limited to temporary retail locations not approved in writing by the NFL.
2. Temporary Sales Permits—No temporary sales permits may be granted within the clean zone during Super Bowl week[.]
3. Temporary signage- A prohibition against temporary signage or banners, video screens, electronic message boards, or nighttime projections of commercial messages during Super Bowl week.
4. Inflatables- A prohibition against the installation or display of inflatables.
5. Building Wraps- A prohibition against existing buildings temporarily wrapped with advertising banners or signage (except for even-related [sic] signage approved by the NFL).
6. Preventive Fund- If such prohibitions cannot be obtained, the Host Committee must provide a fund of one million dollars (\$1000000) for the NFL to use to prevent ambush marketing.<sup>143</sup>

Furthermore, North Texas’ Bid Summary states that the City of Arlington, as it did with the NBA All-Star Week,<sup>144</sup> “adopted (without controversy) a series of anti-ambush marketing ordinances in effect for events at the Stadium.”<sup>145</sup> The host committee also agreed to work with the municipal jurisdictions to support the secondary clean zones at the area airports and for the NFL Experience, including the City of Fort Worth.<sup>146</sup>

Fort Worth, which housed both Super Bowl teams and attractions such as the NFL Experience and ESPN’s Super Bowl coverage, enacted a clean-zone ordinance that followed the NFL’s recommendations precisely.<sup>147</sup> The biggest difference between Arlington’s clean-zone ordinance and Fort Worth’s is that

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142. *Id.* at 63.

143. *Id.*

144. *See* Schrock, *supra* note 137.

145. *North Texas Bid Summary*, *supra* note 14, at 114 n.11.

146. *Id.* at 114 n.11, 115.

147. *See generally* FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010 (2010) (repealed 2011).

Arlington's did not permit any temporary commercial speech,<sup>148</sup> while Fort Worth's ordinance subjected application for temporary commercial speech to the approval of the NFL's sole-discretion.<sup>149</sup>

### *B. Fort Worth's Clean-Zone Ordinance*

Fort Worth's clean-zone ordinance was enacted on January 23, 2011, effective until 12:01 AM on February 8, 2011, the night after the Super Bowl.<sup>150</sup> The ordinance first set out that the NFL "owns, produces and controls the annual professional football championship game known as the 'Super Bowl.'"<sup>151</sup> Then, the ordinance provided that the purpose for hosting the Super Bowl in North Texas is to "create substantial beneficial economic and fiscal activity."<sup>152</sup> As host of the NFL Experience, the NFL Super Bowl headquarters, and the American Football Conference (AFC) champions, it was Fort Worth's goal, by enacting the clean-zone ordinance, to protect the city's festive image beginning fourteen days before the Super Bowl.<sup>153</sup>

Fort Worth found it necessary to enact the ordinance because the NFL informed city officials that difficulties have ensued in Super Bowl host cities where there was no regulation of "temporary outdoor advertising displays visible from public streets or sidewalk[s] in the vicinity of Super Bowl related events result[ing] in pedestrian and vehicular traffic" safety issues.<sup>154</sup> The safety concern is increased because of the large gatherings of people who enter the clean-zone area.<sup>155</sup> Finally, the last purpose for enacting the ordinance was to "promote and protect good order and aesthetic quality and to protect the safety and convenience of drivers and pedestrians in and around downtown during the Super Bowl XLV and its related Super Bowl activities."<sup>156</sup> This language set out aesthetics and public safety as likely legitimate governmental interests that would be furthered by suppressing otherwise legal commercial speech.

Section One describes the geographical area that constitutes the clean zone

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148. See generally ARLINGTON, TEX., ORDINANCE NO. 10-095 (2011) (repealed 2011).

149. See FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010. §§ 1(1)–(2), (6)–(7), 2(4).

150. *Id.* § 1.

151. *Id.* § 1.

152. *Id.* § 5.

153. *Id.* §§ 6, 8.

154. *Id.* § 9.

155. *Id.* § 10.

156. *Id.* § 12.

and the activities prohibited within that zone.<sup>157</sup> The ordinance prohibits the following if visible from any public street, property, or sidewalk, unless approved by the NFL: (1) any “Outdoor Event,” (2) any temporary structure, unless it is adjacent to the host’s place of business and used for a private party of less than 500 people, and (3) any “[o]utdoor advertising displays, including, but not limited to, portable signs, flags, streamers, pennants, banners, decorative flags, video screens, balloons, electronic message boards, nighttime projections of commercial messages, inflatables and building wraps.”<sup>158</sup> However, restaurant A-frame and window signs are permitted under the ordinance.<sup>159</sup>

Although Fort Worth’s clean-zone ordinance specifically stated that its governmental interests were public safety and aesthetics, the fact that the phrase “unless approved by the NFL” appears throughout the ordinance suggests otherwise. Specifically, the NFL used its influence so that during the two weeks prior to the Super Bowl, other non-legitimate interests—such as preventing otherwise legal ambush marketing—were met in addition to the legitimate aesthetic and public safety interests.

#### V. THE CONSTITUTIONALITY OF FORT WORTH’S CLEAN-ZONE ORDINANCE AND RECOMMENDATIONS FOR FUTURE SUPER BOWL HOST CITIES

Fort Worth’s clean-zone ordinance, on its face, is unconstitutional. Applying the Central Hudson and Metromedia standards, a court may hold that aesthetics should not be a legitimate governmental interest because Fort Worth clearly had an ulterior motive—bowing to the demands of the NFL to secure the Super Bowl for the North Texas area. Furthermore, the clean-zone ordinance provides the NFL with unbridled discretion to determine what businesses may use outdoor advertising. This is in direct conflict with *Atlanta Journal & Constitution*. To avoid or defeat a constitutional challenge, future Super Bowl host cities should not include the language “unless approved by the NFL” within an enacted clean-zone ordinance.

##### *A. Fort Worth’s Clean-Zone Ordinance: An Argument Against Constitutionality*

This subsection will apply the Central Hudson, Metromedia, and *Atlanta Journal* doctrines to evince that Fort Worth’s clean-zone ordinance is facially

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157. *Id.* § 1.

158. *Id.* §§ 1(1)–(2), (6).

159. *Id.* § 1(6).



unconstitutional. Assume that a restaurant owner brought a constitutional challenge against the ordinance prior to Super Bowl XLV. The restaurant was within the clean zone, but the owner was going to temporarily advertise—using legal and nonmisleading commercial speech—on-site and outdoors. The advertising promoted a beer that was not the official beer sponsor of the NFL but was a product sold at the restaurant. Furthermore, the beer advertising was visible from the public street.

Under the Central Hudson test, Fort Worth would have to assert legitimate governmental interests for restricting the restaurant's commercial speech. According to Fort Worth's Frequently Asked Questions About Clean and Buffer Zones, the zones were not only "created to protect public health, welfare and safety," but to also protect against ambush marketing and selling tactics during Super Bowl week.<sup>160</sup> The interest Fort Worth has in relation to protecting against ambush marketing tactics during Super Bowl week would likely be the economic value of having the Super Bowl in North Texas.

In both the Fort Worth and Arlington clean-zone ordinances, one of the goals of, and interests in, hosting the Super Bowl was to "create substantial beneficial economic and fiscal activity."<sup>161</sup> If the North Texas Bid Committee failed to promise the NFL that Arlington and Fort Worth would enact clean-zone ordinances, one could assume that the NFL would look to other cities for hosting the Super Bowl because the NFL's interests in having an aesthetically-pleasing, safe,<sup>162</sup> and ambush-free event would not be met. Therefore, both Arlington and Fort Worth would not meet their own interest in creating substantial economic and fiscal activity; courts have previously held that economic vitality is a legitimate governmental interest.<sup>163</sup>

Aesthetics are usually a legitimate governmental interest—advanced here by limiting what advertising, vending, and events may occur on public property or within the view from public streets—because a city's desire to have a clean-looking presence, especially when hosting a worldwide event such as the Super Bowl, is within a city's police power.<sup>164</sup> However, aesthetics may not be found to be a legitimate governmental interest when

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160. *Frequently Asked Questions About Clean and Buffer Zones*, CITY FORT WORTH, [http://www.fortworthgov.org/uploadedFiles/Super\\_Bowl\\_Clean\\_Zone.pdf](http://www.fortworthgov.org/uploadedFiles/Super_Bowl_Clean_Zone.pdf) (last visited Feb. 26, 2011) [hereinafter *Fort Worth FAQ*].

161. FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010 § 5; ARLINGTON, TEX., ORDINANCE NO. 10-095, § 8 (2011) (repealed 2011).

162. Telephone Interview with Dave Weinberg, *supra* note 13.

163. *See Roulette v. Seattle*, 850 F. Supp. 1442, 1447 (W.D. Wash. 1994).

164. *See Metromedia*, 453 U.S. at 510.

there is an ulterior motive for having such an ordinance.<sup>165</sup> As the Court in *Metromedia* proclaimed, “[a]esthetic judgments are necessarily subjective, defying objective evaluation, and [therefore, such restrictions] must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.”<sup>166</sup> It could be successfully argued that Fort Worth had an ulterior motive in enacting its clean-zone ordinance. Fort Worth effectively gave the NFL monopoly power over the clean-zone area to benefit the NFL’s value for its official sponsors and to protect those sponsors from ambush marketing. This was boldly evident in the North Texas Bid Summary<sup>167</sup> and in Fort Worth’s published frequently asked questions document available on its website.<sup>168</sup> Both state that in addition to protecting aesthetics and public safety, the ordinances were also created to protect the downtown area from ambush marketing tactics.<sup>169</sup>

Such ambush marketing tactics would be used not only to capitalize on the NFL’s goodwill and reputation, but also to clutter the market space. These tactics would inevitably make the NFL’s official sponsorships less valuable. According to the ordinance, the NFL may grant approval to anyone it desires to have off-site and outdoor temporary signage within the clean zone.<sup>170</sup> Therefore, because the ordinance permits the NFL, in its sole discretion, to prohibit commercial speech, aesthetics may not be utilized as a legitimate governmental interest. However, this discussion does not base its argument solely upon this issue. Even assuming *arguendo* that aesthetics would be found as a valid governmental interest, the ordinance may still be unconstitutional.

The third part of the Central Hudson test is to determine whether the clean-zone ordinance directly furthers the legitimate governmental interests. First, the potential economic vitality interest is not furthered by the clean-zone ordinance. On its face, the ordinance permits the NFL to grant permission to itself or to any of its official sponsors to host outdoor events, place temporary structures, have outdoor temporary signage, or allow temporary vending that is “visible from any public street, public property or sidewalk.”<sup>171</sup> Allowing the NFL such a unilateral power may still directly further Fort Worth’s legitimate

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165. *Id.*

166. *Id.*

167. *North Texas Bid Summary*, *supra* note 14, at 62–63.

168. *Fort Worth FAQ*, *supra* note 160.

169. *Id.*; *North Texas Bid Summary*, *supra* note 14, at 62–63.

170. FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010, § 1(6) (2010) (repealed 2011).

171. *See Id.* §§ 1(1)–(2), (6)–(7).

interests in aesthetics and public safety because the ordinance would still work to limit all other commercial speech.

However, it can be argued that, on its face, the ordinance restricts economic vitality rather than advances it. Prohibiting a restaurant located within the designated clean zone from placing on-site and outdoor advertising of its products facing the public street may hinder the restaurant's business. It would effectively be prohibited from having outdoor advertising promoting any of the NFL nonofficial sponsor's beer specials it may have during Super Bowl week, or that it even sells the product on location. Fort Worth might argue that the ordinance's purpose, as related to economic vitality, is to grow the future prosperity of the city as a whole, and businesses should not merely look at the short-term; however, hosting the Super Bowl generally has no actual economic effect on the host city.<sup>172</sup> Additionally, any economic vitality interest would not be furthered by enacting the clean-zone ordinance, but only by hosting the Super Bowl. Therefore, economic vitality is likely not a legitimate governmental interest advanced by the clean-zone ordinance.

Furthermore, an argument exists that aesthetics is not furthered directly by the clean-zone ordinance either. The ordinance allows the NFL, or whoever the NFL allows, to place temporary off-site signage and vending in and around the clean zone. There is no limit within the ordinance preventing the NFL from allowing only a certain number of off-site temporary signage; therefore, it is certainly plausible that the NFL could grant approval to its partners and sponsors for more signage and vending than would have otherwise been if no approval was needed. Although plausible, this argument will likely not succeed because an ordinance meant to directly further aesthetics does not have to eliminate clutter or excessive off-site signage, but must merely limit it.<sup>173</sup> Alternatively, a court may still strike down the ordinance on the basis of the Central Hudson test due to the public's value placed on on-site signage.

The Central Hudson test requires a determination of whether Fort Worth's clean-zone ordinance is narrowly tailored to further its potential legitimate interests in aesthetics and public safety. Fort Worth's clean-zone ordinance may not be narrowly tailored because the NFL may facially prohibit, in its sole discretion, the restaurant's on-site outdoor advertising of products available, which would otherwise be permissible.<sup>174</sup> As the ordinance suggests, any

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172. See Darren Rovell, *What Is a Super Bowl Worth? Good Question*, ESPN (Feb. 2, 2006), <http://sports.espn.go.com/nfl/playoffs05/news/story?id=2315303>.

173. See *Metromedia*, 453 U.S. at 511–12.

174. See Diaz, *supra* note 15. The West End Pub's owner was informed by police that he had to take down Bud Light signage he had on his property that was outside on his property but faced the

signage that is visible from the public street or sidewalk is not permitted, unless approved by the NFL. Furthermore, the ordinance grants the NFL approval rights for temporary off-site signage, which Metromedia clearly prohibits because greater value is given to on-site signage than off-site signage and consumers have a material interest in knowing what products the restaurant sells,<sup>175</sup> which the ordinance facially prohibits. Therefore, the ordinance may be constitutionally overbroad because it facially prohibits businesses from certain on-site advertising of their products while allowing the NFL to grant approval for off-site advertising to its official sponsors.<sup>176</sup> The ordinance would not have been overbroad had it merely prohibited all temporary commercial speech, as the Arlington ordinance did.

Apart from the Central Hudson test, there are specific provisions in the Fort Worth's clean-zone ordinance that make the ordinance facially unconstitutional as well. The ordinance permits the NFL, a private entity, to use unbridled discretion to favor its official sponsors over nonofficial sponsor companies. The ordinance grants the NFL the power to allow its official sponsors to place outdoor temporary advertising in public areas.<sup>177</sup> However, the ordinance also facially provides the NFL with unbridled discretion to prohibit companies not officially affiliated from temporarily advertising. As the Eleventh Circuit ruled in *Atlanta Journal & Constitution*, a government may not place complete and unbridled discretion in a government official.<sup>178</sup> A logical argument flowing from such a holding is that a government would therefore be prohibited from placing such unbridled discretion in a private entity like the NFL. Therefore, Fort Worth's clean-zone ordinance is, on its face, unconstitutional.

However, because the ordinance has a severability clause, which states that if any provision in the ordinance is found unconstitutional, only the unconstitutional provision shall be removed from the ordinance, and the remaining constitutional provisions will remain intact.<sup>179</sup> Removing the "unless approved by the NFL" language would leave Fort Worth's ordinance nearly identical to Arlington's. Arlington's ordinance appears to treat all off-site commercial speech identically and does not give any public official or private entity unbridled discretion to approve what would otherwise be

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public street. *Id.*

175. See *Metromedia*, 453 U.S. at 511–12.

176. See *Diaz*, *supra* note 15.

177. See FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010, § 1(6) (2010) (repealed 2011).

178. *Atlanta Journal & Constitution*, 322 F.3d at 1310.

179. FORT WORTH, TEX., ORDINANCE NO. 19492-12-2010, § 6.

prohibited under the clean-zone ordinance and is, therefore, facially constitutional.

*B. Recommendations for Future Super Bowl Clean-Zone Ordinances*

In the future, the NFL should not include its “unless approved by the NFL” language in its bid package requirements. The NFL wants to protect its official sponsorships’ values and provide its sponsors with a completely protected platform at the Super Bowl to activate their sponsorships and improve their brands’ recognition. However, it should not put host cities, which advance the massive amounts of money to host the NFL’s mega-event, in the position of enacting an unconstitutional ordinance in order to do so. For the Super Bowl clean-zone ordinances to be constitutional, the NFL will have to “deal with” eliminating all off-site commercial speech from the cities hosting future Super Bowls, and not merely the commercial branding and advertising of whomever the NFL disapproves.

VI. CONCLUSION

All sports entities go to enormous lengths in protecting themselves and their official sponsors from ambush marketing and selling tactics. Some have brought suit under the Lanham Act for an ambusher allegedly profiting from the entity’s goodwill and reputation, while other entities have persuaded and lobbied local governments to enact legislative regulations restricting such ambush marketing tactics. Additionally, many countries have enacted legislation on a national level to prohibit ambush marketing during worldwide events like the FIFA World Cup and the Olympic Games. However, in the United States, legislatures should be mindful to enact an ordinance that that will be upheld against a constitutional challenge.

The NFL should not be blamed for flexing its muscle and “recommending” that host bid cities promise to enact a clean-zone ordinance during the Super Bowl. The NFL has valid and substantial business interests in aesthetics and public safety at the Super Bowl as well as protecting the value of its official sponsorships. Companies pay millions of dollars every year to be officially associated with the United States’ most popular professional sports league, and the NFL should flex its muscles to prevent any ambush marketing tactics from occurring where it could potentially hinder the value of its official sponsorships or take away from the aura surrounding its championship game. Allowing such conduct may certainly be detrimental to one’s brand, and companies may think even harder about whether the investment is actually worth the price.

Event organizers must always be cognizant of ambush marketing tactics. The official sponsors will certainly question whether the sponsorship is actually worth what they paid if the ambush marketers can profit off the event without paying the official sponsorship fees. However, as an event organizer, there is only so much one can do to prevent such ambush marketing tactics. The NFL, as evidenced by the Fort Worth clean-zone ordinance, essentially owned the entire concept of, and aura surrounding,<sup>180</sup> the Super Bowl's festivities area by having approval rights for who could temporarily advertise in the public space. In Arlington, the NFL was still protected from most ambush marketing tactics; however, it could not implement its own marketing tactics as it could in Fort Worth. The NFL, like most sport entities, has taken on the responsibility to keep official sponsorship values protected. However, it should use all constitutional means to support its sponsors regarding clean-zone requirements, rather than conducting itself in a manner that may subject the Super Bowl's host to constitutional challenge.

Ari J. Sliffman

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180. Moorman & Greenwell, *supra* note 21, at 184.